No. 94-1387

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In The

Supreme Court of the United States

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A.
-and-
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

vs.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM J. TAYLOR
Counsel of Record
TAYLOR & TAYLOR
Attorneys for Respondents
1801 Market Street
Suite 811
Philadelphia, Pennsylvania 19103
(215) 568-2644

6652
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Did the Court of Appeals correctly decide that federal maritime law permits application of state wrongful death and survival statutes where the decedent is neither a seaman nor a longshoreman, the decedent's fatal injuries occurred in territorial waters, and the focus of the wrongdoing is land-based, not maritime?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lucien B. Calhoun and Robin L. Calhoun, individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased ("Respondents"), submit this brief in

response to the Petition for a Writ of Certiorari. Although Respondents strongly disagree with Petitioners on the merits of the issues presented, Respondents support the Petition insofar as it requests this Court to grant certiorari on the first question presented.

STATEMENT OF THE CASE

This action arose from the July 6, 1989 death of Natalie Calhoun, the twelve year old daughter of Lucien B. Calhoun and Robin L. Calhoun. Natalie died from injuries sustained in a collision with a vessel anchored in the territorial waters of Puerto Rico. At the time of the accident Natalie was operating a Yamaha Wavejammer, a personal watercraft commonly referred to a jet ski, designed and manufactured by defendants Yamaha Motors Corporation, U.S.A. and Yamaha Motor Company, Ltd. ("Petitioners") for recreational use. Respondents instituted suit against Petitioners asserting claims of negligence, design defect and breach of warranty for the conduct of Yamaha which occurred on land, not in the territorial waters of the United States.

On November 27, 1991, Petitioners moved for partial summary judgment in the United States District Court for the Eastern District of Pennsylvania, arguing that federal maritime law governs this action and that loss of society, loss of future wages, and punitive damages are not recoverable under the federal maritime wrongful death cause of action created in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Alternatively, Petitioners argued that, should it be determined that damages for loss of society are permitted under federal maritime law, Respondents must first demonstrate financial dependency on their minor child before loss of society damages can be awarded.

Respondents' opposition to Petitioners' motion contained

three arguments: (1) Maritime law does not apply since the wrong complained of does not bear a significant relationship to traditional maritime activity; (2) In the absence of a conflict with federal maritime law, maritime law does not preempt state wrongful death and survival statutes where the decedent is neither a seaman nor a longshoreman and the decedent's death occurs in territorial waters; and, (3) If federal maritime law does preempt state wrongful death and survival statutes, federal maritime law permits survivors such as Respondents to recover damages for loss of future earnings, punitive damages and damages for loss of society, irrespective of whether the survivor was financially dependent on the decedent.

The district court granted in part and denied in part Petitioners' motion for summary judgment. Specifically, the court held that maritime law applied and that federal maritime law preempted application of state wrongful death and survival statutes. Delineating the allowable damages, the district court held that, under federal maritime law, Respondents could only recover damages for loss of support and services and damages for loss of society. Neither punitive damages nor damages for loss of future earnings were held to be recoverable.

Petitioners' request for reconsideration of the district court's ruling was denied. However, at the behest of Petitioners and pursuant to 28 U.S.C. § 1292(b), the district court agreed to certify for appeal to the Third Circuit the question of whether damages for loss of society could be awarded under federal maritime law. Pet. App. 73a. Acting on Respondents' request, the court amended its certification order to include the questions on which Petitioners had prevailed, whether loss of future earnings and punitive damages are recoverable. Pet. App. 78a.

Despite Petitioners' suggestions to the contrary, the Third Circuit held that this action falls under the court's admiralty

jurisdiction. Pet. for Writ at 5, 6; Pet. App. 7a, 8a. Although the certified questions, as phrased by the district court, ask what damages are available under *federal* maritime law, the Third Circuit correctly held that those questions need not be addressed unless a determination was made that federal maritime law preempts state wrongful death and survival statutes. Pet. App. 6a. Accordingly, the Third Circuit assumed appellate jurisdiction to decide not just the certified questions but whether the premise of the district court, that federal not state law applies, was correct. Pet. App. 6a. Then, in a thorough and well-reasoned opinion, written by Judge Becker, the court held that federal maritime law's traditional choice of law principles required application of state wrongful death and survival statutes since there was no conflict between state law and federal maritime law. Therefore, it did not reach the certified questions, which dealt with only federal law.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE GRANTED ON THE FIRST QUESTION PRESENTED IN THIS PETITION.

Although Respondents strongly disagree with Petitioners on the merits of the first question presented, they agree that the Third Circuit's opinion is in conflict with the Second Circuit's decision in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1016 (1994). In *Wahlstrom*, plaintiffs instituted suit against defendants seeking damages for the fatal injuries sustained by their seventeen year old son in a jet ski accident. Pursuant to Connecticut's Product Liability Act and its wrongful death provision, plaintiffs' prayer for relief requested punitive damages and damages for loss of society. The Second Circuit held that federal maritime law preempted the application of the wrongful death provision of Connecticut's statute and that federal maritime law limited plaintiffs' award to

only those damages allowable by the Jones Act[1] and the Death on the High Seas Act ("DOHSA")[2].

Respondents, however, disagree with Petitioners that the Third Circuit's opinion is in direct conflict with the decisions of the Fifth, Sixth, Eighth and Ninth Circuits. Careful examination of the cases cited by Petitioners at pages 11 and 12 of their Petition for Writ for Certiorari demonstrates that the Second Circuit remains the only circuit in direct conflict with the Third Circuit's holding below. In *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993), the Fifth Circuit, while questioning the viability of damages for loss of society, refused to expressly hold that those damages were not available under maritime law. *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1980), is factually distinguishable in that there the plaintiffs were the parents of adult, emancipated children. In *Spiller v. Thomas M. Lowe Jr. & Assocs., Inc.*, 466 F.2d 903 (8th Cir. 1972), the issue before the Eighth Circuit was not whether federal maritime law preempted state wrongful death and survival statutes for deaths occurring in territorial waters, but whether parents are included in the class of beneficiaries who may recover damages under a federal maritime wrongful death cause of action. Nevertheless, the Eighth Circuit looked to Arkansas' survival statute for guidance and further stated that plaintiffs' survival action existed under the Arkansas statute. Finally, in a well-reasoned opinion, the Ninth Circuit held in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), that maritime law permitted nondependent parents to recover loss of society and loss of future earnings as damages for the death of a nonseaman or nonlongshoreman killed in territorial waters.

Even with only one direct conflict, Respondents agree that

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1. 46 U.S.C. § 688.

2. 46 U.S.C. §§ 761-768.

this is an appropriate case in which to consider the question of whether federal or state law applies. The Respondents in this case are typical of the plaintiffs who will seek to recover damages under state wrongful death and survival statutes. The Respondents here are nondependent parents of a deceased minor who was neither a seaman nor a longshoreman and whose death occurred in territorial waters. Respondents, in their individual capacity, seek damages for loss of their daughter's society and, as representatives of their daughter's estate, seek loss of future earnings and punitive damages.

The question presented here is also very important. Despite Congress' express intent that the DOHSA does not preempt state wrongful death and survival statutes where death occurs in territorial waters[3], some lower courts continue to hold that federal maritime law, as developed by federal courts, preempts those state statutes. As a result, those courts limit individuals such as Respondents to only those damages permitted under the DOHSA and/or the Jones Act.

Some lower courts, as well as Petitioners herein, have misconstrued this Court's goal for a uniform bases of *liability* in maritime actions to mean that *damages* for all persons injured in territorial waters must be limited to those damages allowed under the Jones Act and the DOHSA. Yet neither the Jones Act nor the DOHSA govern actions brought by the survivors of persons who are neither seamen nor longshoremen and who were killed in territorial waters. If this Court's goal of "uniformity in admiralty" were to be interpreted as Petitioners suggest, the result will be to create a presumption in favor of borrowing from federal law, since the only way to have the same measures of damages in every instance is to use a damages provision adopted from a federal statute. Yet, this approach effectively reverses the

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3. 46 U.S.C. § 765.

long-standing presumption in favor of applying state law where state law does not conflict with federal maritime law.

While acknowledging at page 14 of their Petition that this Court has never ruled on the issues presented for review, Petitioners, citing *Moragne*, 398 U.S. 375; *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990); and, *Texaco Refining and Marketing Inc. v. Estate of Dau Van Tran*, 497 U.S. 1020 (1990), nevertheless argue that the Third Circuit's ruling is inconsistent with the express holdings and intent of this Court. Yet, this Court's holdings in *Foremost* and *Sisson* have no bearing on the issue of what damages are recoverable in a maritime cause of action. Rather, the issues decided there were whether the facts of those cases invoked the courts' admiralty jurisdiction.

Regarding *Moragne*, while this Court created a federal maritime wrongful death cause of action for unseaworthiness, the Court did not create a federal maritime survival cause of action. Nor did this Court create a federal maritime wrongful death cause of action for negligence. Respondents' claims against Petitioners are not based on the principles of negligence, products liability and breach of warranty arising from Petitioners' land-based, not maritime, conduct. Nor are Respondents' claims based on the doctrine of seaworthiness.

Finally, in *Texaco Refining & Marketing, Inc.*, 497 U.S. 1020, this Court remanded the case to the Texas state court, instructing that court to reconsider its decision in light of the *Sisson* decision. There was no holding by this Court that federal law preempted the damages provisions of state wrongful death and survival statutes. Thus, Petitioners' statement that the Third Circuit's opinion is against the express holdings and implied intent of this Court is simply not accurate.

Although Respondents agree that the first question is appropriate for review, we oppose review on the second question raised by Petitioners — the scope of damages assuming federal maritime law applies — for several reasons. First, the Third Circuit never addressed the issue. Second, by definition, there can be no conflict between the Third Circuit and any other court of appeals, or for that matter state court, on the issue. Third, as the lengthy opinion of Judge Becker makes clear, the first question is sufficiently complex on its own, without assuming the burden of the second question, which is actually several questions rolled into one, since it asks, in essence, which elements of damages are available under federal maritime law for a wrongful death claim arising in territorial waters. Should the Court reject our analysis and that of the Third Circuit, there will be time enough for the lower courts to consider those other issues, informed by the decision in this case. Accordingly, the grant of certiorari should be limited to the first question presented, as restated in this brief in response.

CONCLUSION

The writ for certiorari should be denied.

Respectfully submitted,

WILLIAM J. TAYLOR
Counsel of Record
TAYLOR & TAYLOR
Attorneys for Respondents
1801 Market Street
Suite 811
Philadelphia, PA 19103
(215) 568-2644